

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION**

ROBERT L. ROSE,

Plaintiff,

vs.

ROSS SWANSON, et al.,

Defendants.

Cause No. CV 10-00048-H-DWM-RKS

ORDER TO SERVE COMPLAINT ON  
DEFENDANT SHORT BY REQUESTING WAIVER  
OF SERVICE OF SUMMONS AND FINDINGS  
AND RECOMMENDATION TO DISMISS  
DEFENDANT LARNER

(Defendants please see D.Mont. L.R. 12.2)

Plaintiff Robert Rose is a prisoner proceeding without counsel who has been granted permission to proceed in forma pauperis. The Court has jurisdiction pursuant to [28 U.S.C. § 1331](#).

On November 3, 2010, the Clerk of Court was directed to serve Legal Counsel for the Department of Corrections on behalf of Defendants pursuant to Rule 4 of the Federal Rules of Civil Procedure. (Court Doc. 4). On November 30, 2010, Legal Counsel for the Department of Corrections declined to waive service on behalf of Defendants Edward Short and Anita Larner. (Court Doc. 6). By Order dated December 2, 2010, the Court required Mr. Rose to provide a

current mailing address for Defendants Short and Larner.

On December 27, 2010, Mr. Rose provided a current address for Defendant Short. Accordingly, the Complaint will be served upon Defendant Short.

Mr. Rose also indicated in his response that Defendant Larner is in Wyoming somewhere. This is insufficient information upon which to serve Defendant Larner. Although an incarcerated pro se plaintiff is entitled to rely on the U.S. Marshal for service of summons, they must provide the necessary information to help effectuate service. [\*Puett v. Blandford\*, 912 F.2d 270, 275 \(9th Cir. 1990\)](#). As Mr. Rose has not provided the information necessary to effectuate service, the Court will recommend Defendant Larner be dismissed without prejudice for failure to serve the Complaint in compliance with Rule 4 of the Federal Rules of Civil Procedure.

Based on the foregoing, the Court issues the following:

### **ORDER**

1. Pursuant to [\*Fed.R.Civ.P. 4\(d\)\*](#), the Court will request Defendant Short to waive service of summons by executing, or having

counsel execute, the Waiver of Service of Summons. The Waiver must be returned to the Court within **thirty (30) days of the entry date reflected on the Notice of Electronic Filing**. If Defendant Short chooses to return the Waiver of Service of Summons, his answer or appropriate motion will be due within 60 days after the entry date of this Order as reflected on the Notice of Electronic Filing, pursuant to [Fed.R.Civ.P. 12\(a\)\(1\)\(B\)](#).

2. The Clerk of Court shall forward the following to:

Ed Short  
Granite County Sheriff's Office  
115 Kearney Street  
P.O. Box 188  
Philipsburg, MT 59858

- \* Complaint (Court Doc. 2);
- \* July 14, 2010 Order filed in Civil Action No. 10-CV-0002-H-DWM-RKS (Court Doc. 11);
- \* Defendants' Answer (Court Doc. 10);
- \* this Order,
- \* a Notice of Lawsuit & Request to Waive Service of Summons; and
- \* a Waiver of Service of Summons

Counsel for Defendant Short must file a "Notice of Appearance" as a separate document at the time an Answer or [Rule 12](#) motion is filed. *See* D. Mont. L.R. 12.2.

3. Any party's request that the Court grant relief, make a ruling, or take an action of any kind must be made in the form of a motion, with an appropriate caption designating the name of the motion, served on all parties to the litigation, pursuant to [Federal Rules of Civil Procedure 7, 10, and 11](#). If a party wishes to give the Court information, such information must be presented in the form of a notice. The Court will not consider requests made or information presented in letter form.

4. Pursuant to [Fed.R.Civ.P. 5\(a\)](#), all documents presented for the Court's consideration must be simultaneously served by first-class mail upon the opposing party or their counsel if the party is represented. Each party shall sign and attach a proper certificate of service to each document filed with the Court. The Certificate of Service must state the date on which the document was deposited in the mail and the

name and address of the person to whom the document was sent. The sender must sign the certificate of service.

5. Mr. Rose shall not make any motion for default until at least seventy (70) days after the date of this Order.

6. At all times during the pendency of this action, Mr. Rose SHALL IMMEDIATELY ADVISE the Court and opposing counsel of any change of address and its effective date. Such notice shall be captioned "NOTICE OF CHANGE OF ADDRESS." The notice shall contain only information pertaining to the change of address and its effective date, except if Mr. Rose has been released from custody, the notice should so indicate. The notice shall not include any motions for any other relief. Failure to file a NOTICE OF CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute pursuant to [Fed.R.Civ.P. 41\(b\)](#).

Further, the Court issues the following:

### **RECOMMENDATIONS**

Defendant Larner should be dismissed without prejudice.

## NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), the parties may serve and file written objections to these Findings and Recommendations within fourteen (14) days of the date entered as indicated on the Notice of Electronic Filing. As this deadline allows a party to act after the Findings and Recommendations is served, it falls under [Fed.R.Civ.P. 6\(d\)](#). Therefore, three (3) days are added after the period would otherwise expire.

Any such filing should be captioned "Objections to Magistrate Judge's Findings and Recommendations."

A district judge will make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge and may waive the right to appeal the District Court's order. [Martinez v. Ylst](#), 951 F.2d 1153 (9th Cir. 1991).

This order is not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to [Fed.R.App.P. 4\(a\)](#), should not be filed until entry of the District Court's final judgment.

DATED this 4th day of January, 2011.

/s/ Keith Strong  
Keith Strong  
United States Magistrate Judge

**NOTICE OF LAWSUIT AND REQUEST FOR  
WAIVER OF SERVICE OF SUMMONS**

TO: Ed Short  
Granite County Sheriff's Office  
115 Kearney Street  
P.O. Box 188  
Philipsburg, MT 59858

A lawsuit has been commenced by a pro se plaintiff against you. A copy the Complaint is attached to this notice. It has been filed in the United States District Court for the District of Montana, Civil Action No. CV-10-00048-H-DWM-RKS. The Court has completed its pre-screening and concludes Defendants must file a responsive pleading. See [42 U.S.C. §1997e\(c\), \(g\)\(2\)](#); [28 U.S.C. §§1915\(e\)\(2\), 1915A\(a\), \(b\)](#).

This is not a formal summons or notification from the Court, but rather a request that you sign and return the enclosed waiver of service in order to save the cost of service by the U.S. Marshal's Service. The cost of service will be avoided if you return the signed Waiver of Service of Summons within 30 days after the entry date reflected on the Notice of Electronic Filing of the "Order to Serve Complaint by Requesting Waiver of Service of Summons," which was served with this Notice.

If you comply with this request and return the waiver to the Court, it will be filed with the Court and no summons will be served. The action will then proceed as if you had been served on the date the waiver is filed, except you must file an answer or appropriate motion before 60 days from the date the Order directing this Notice of Lawsuit and Request for Waiver of Service of Summons to be sent was entered as indicated on the Notice of Electronic Filing.

If you do not wish to waive service on behalf of Defendants, please indicate this on the Waiver of Service of Summons form. The Court will, in turn, order the U.S. Marshal's Service to serve the Complaint personally on Defendants and may impose the full costs of such service.

/s/ Keith Strong\_\_\_\_\_  
Keith Strong  
United States Magistrate Judge



WAIVER OF SERVICE OF SUMMONS

TO: The U.S. District Court for the District of Montana

The following Defendants acknowledge receipt of your request that they waive service of summons in the following action: Rose v. State of Montana, et al., Civil Action No. CV-10-00048-H-DWM-RKS filed in the United States District Court for the District of Montana. Defendants have also received a copy of the Complaint. I am authorized by the following Defendants to agree to save the cost of service of a summons and an additional copy of the complaint in this action by not requiring that the following individuals be served with judicial process in the case provided by [Fed.R.Civ.P. 4](#):

\_\_\_\_\_; \_\_\_\_\_;  
\_\_\_\_\_; \_\_\_\_\_;  
\_\_\_\_\_; \_\_\_\_\_;

The above-named defendants retain all defenses or objections to the lawsuits or to the jurisdiction or venue of the Court except for objections based on a defect in the summons or in the service of the summons. I understand judgments may be entered against the above-named defendants if an answer or motion under [Fed.R.Civ.P. 12](#) is not served within 60 days after the date the Order directing the Notice of Lawsuit and Request for Waiver of Service of Summons to be sent was entered as indicated on the Notice of Electronic Filing.

I decline to waive service on behalf of the following defendants:

\_\_\_\_\_; \_\_\_\_\_;  
\_\_\_\_\_; \_\_\_\_\_;  
\_\_\_\_\_; \_\_\_\_\_;

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
PRINTED/TYPED NAME

\_\_\_\_\_  
ADDRESS